

**CITATION:** Nordik Windows Inc. v. Aviva Insurance Co., 2023 ONSC 2958  
**COURT FILE NO.:** CV-20-643386-CP  
**DATE:** 20230517

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**RE:** NORDIK WINDOWS INC., Plaintiff

– and –

AVIVA INSURANCE COMPANY OF CANADA, AVIVA GENERAL  
INSURANCE COMPANY and AVIVA CANADA INC., Defendants

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Crawford G. Smith, Rahool P. Agarwal, Matthew R. Law, Cole A. Pizzo, L. Craig Brown, Robert Ben, Stephen Birman, Ava N. Williams, Chris T. Blom, and Mark Frederick, for the Plaintiff*

*Alan L. W. D'Silva, Glenn Zacher, Daniel S. Murdoch, and Lesley Mercer, for the Defendants*

**HEARD:** Cost submissions in writing

**COSTS ENDORSEMENT**

[1] On March 20, 2022, I issued my reasons for decision in respect of the Plaintiff's certification motion. At the same time (and in the same set of reasons) I ruled on the Plaintiff's motion to add new co-Plaintiffs, the Defendants' summary judgment motion, and the Defendants' motion with respect to the tolling of the limitation period: *Nordik Windows Inc. v. Aviva Insurance Co.*, 2023 ONSC 1804.

[2] The Plaintiff was successful in each of those motions. It deserves its costs in accordance with the usual practice that "costs follow the event": *McDougald Estate v. Gooderham*, 2005 CanLII 21091, at paras 76, 91 (Ont CA).

[3] The question is – which event?

[4] When I say that, I do not mean to rhetorically ask which of the companion motions give rise to costs. The Plaintiff was successful in each of the motions addressed in my March 22, 2023 ruling, and it is entitled to costs for all of them together.

[5] That said, it is the certification motion that was the centrepiece of my ruling and that was at the heart of the combined set of motions. The others were by comparison smaller and were really tangents to the certification battle, which was the main event: see *Nordik Windows v. Aviva Insurance*, 2022 ONSC 2536. For present purposes, they are altogether part and parcel of one certification motion.

[6] The real issue here is to determine whether the Plaintiff deserves costs of one certification motion or two. As explained at the outset of my certification reasons, this was the second round for certification of this action.

[7] On December 20, 2021, Justice Belobaba issued an Order that a new hearing be convened and for certification to be re-argued. He had at that point already heard the certification motion and had written his reasons for decision, but had not yet ruled on costs and was still seized of the matter.

[8] The re-hearing arose as a result of an allegation of bias raised by the Defendants flowing from certain on-record discussions between Justice Belobaba and counsel during the certification hearing. After reviewing the transcript, Justice Belobaba found that the hearing had indeed given rise to at least a perception of bias. He therefore recused himself from the case.

[9] The Plaintiff sought to challenge the re-hearing Order, but leave to appeal was denied by Divisional Court: *Nordik Windows Inc. v. Aviva Insurance Company of Canada*, 2022 ONSC 1217.

[10] The matter was re-argued before me for three days as a hearing *de novo* on all issues. The evidentiary record from the first certification hearing was used as the record at the new hearing, along with records from the companion motions brought by each side. Certification factums were also updated and supplemented with factums from the companion motions. At the oral hearing, the entire argument was played out in full for the second time.

[11] Plaintiff's counsel seek \$1,426,059.11 in costs on a partial indemnity basis, broken down as follows:

Fees for Certification Hearing #1	\$1,072,531.73
Fees for Certification Hearing #2	338,594.22
Disbursements for Certification Hearing #1	11,901.64
Disbursements for Certification Hearing #2	<u>3,031.53</u>
Total	\$1,426,059.11

[12] Defendants' counsel submit that \$338,594.22 is a reasonable figure for partial indemnity fees for the second hearing, but argue that no costs are payable in respect of the first hearing.

[13] As is evident, counsel for the Plaintiff view the first and second hearings to be all part of the same matter in which they were ultimately successful. By contrast, counsel for the Defendants view the first and second hearings to be separate and distinct matters in which they were unsuccessful for the second one but for which the first ended inconclusively.

[14] Both sets of counsel are right and wrong.

[15] The Defendants cannot ignore the costs of the first round altogether, since the evidentiary record from the first round was re-used in the second round. The \$338,594.22 claimed by Plaintiff's counsel for the second hearing reflects their costs of that hearing without accounting for preparation of the entire record. Both sides made use of that record.

[16] The Plaintiff cannot include the costs of arguing the first round, since Justice Belobaba ordered that it be repeated. He ruled that the need for repetition of the argument was due to his own comments at the hearing, and not due to the arguments pursued by either counsel. Neither side can claim success from that hearing.

[17] Going through Plaintiff's counsel's detailed account of costs incurred, I will first observe that the disbursements claimed by Plaintiff's counsel in respect of both rounds of certification are payable. Those represent costs that were ultimately used both times.

[18] As for the fees claimed by Plaintiff's counsel, the time spent on the re-usable portion of the first round of motions appears to me to be as follows:

Preparation of certification record	\$ 184,114.92
Examinations (certification)	120,028.50
Factums and research (certification)	153,053.40
Research and preparation of motion to add	204,334.80
Examinations (motion to add)	<u>72,734.10</u>
Total	\$ 734,265.72

[19] The difference between the re-usable fee portion of the first motion and the combined re-usable and non-re-usable fee portion of the first motion [ $\$1,072,531.73 - \$734,265.72 = \$338,266.01$ ] can be deducted from the overall costs claimed in respect of fees for the two motions [ $\$1,426,059.11 - \$338,266.01 = \$1,087,793.10$ ]. This calculation takes into account the work done for the certification motion overall, factoring out the repetition involved in having to do the whole thing twice.

[20] In keeping with the discretionary nature of costs under section 131 of the *Courts of Justice Act*, this is an admittedly rough way of calculating the point. But with that understanding in mind, this figure represents the partial indemnity costs claimed by Plaintiff's counsel in respect of the second motion and the re-used parts of the first motion.

[21] I am not prepared to examine in detail or to second guess the particular hours spent by Plaintiff's counsel on any one aspect of the combined motions. They were complicated and involved an elaborate weaving together of arguments.

[22] The Defendants put up stiff resistance to the Plaintiff's certification, as is their right, and Plaintiff's counsel invested what it took to overcome that resistance. Although the numbers appear to be on the high side even for a certification motion, they are commensurate with the effort put into the matter and the amount at stake in the litigation.

[23] Using a rounded-off figure for convenience, the Defendants shall pay the Plaintiff costs in respect of the combined motions in the all-inclusive amount of \$1,000,000.00.

**Date:** May 17, 2023

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**Morgan J.**